No. 89-1294

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DEBORAH CASSILLY, in her capacity as owner and operator of Bo Peep Day Nursery,

Petitioner,

v.

MARYLAND DEPARTMENT OF HUMAN RESOURCES, MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE, HARFORD COUNTY HEALTH DEPARTMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

The instant child abuse case presents issues similar to those in *Idaho v. Wright*, 116 Idaho 382, 775 P.2d 1224 (1989), *cert. granted*, 58 U.S.L.W. 3443 (U.S. Jan. 16, 1990) (No. 89-260), but provides an alternative way of dealing with out-of-hearing statements made by children to medical experts. In *Idaho v. Wright*, the Supreme Court of Idaho held it unconstitutional to permit an examining pediatrician to tes-

tify about statements made by a two-and-a-half year old girl during an unrecorded interview in which the pediatrician used leading questions and had a preconceived idea of what the child would tell him. Petitioner in the instant case maintains that admission of similar testimony—testimony by a psychologist about out-of-hearing statements made by young children—may be permissible, but only so long as petitioner's own experts are allowed to interview the children before the hearing.

The question presented in this case deserves review, particularly in view of the Court's decision to review related issues in *Idaho v. Wright* and *Maryland v. Craig*, 316 Md. 551, 560 A.2d 1120 (1989) *cert. granted*, 58 U.S.L.W. 3443 (January 16, 1990) (No. 89-478). Respondents hardly contend otherwise. Instead, respondents, in an opposition that is loaded with irrelevant characterizations of the conduct charged in this case, rely upon three arguments.

1. Respondents' first argument is that the existence of "substantial" evidence provides a state law grounds upon which the decision of the Maryland agency could have been upheld and that review by this Court is therefore foreclosed. However, review of the constitutionality of procedures used is independent of review to examine whether the agency decision was supported by substantial evidence. *See Communications Investment Corp. v. Federal Communications Commission*, 641 F.2d 954, 972 (D.C. Cir. 1981); *cf. Chaney Creek Coal Corp. v. Federal Mine Safety & Health Review Comm'n*, 866 F.2d 1424 (D.C. Cir. 1989); *Consolidated Oil & Gas, Inc. v. Federal Energy Regulatory Comm'n*, 806 F.2d 275 (D.C. Cir. 1986) (engaging in substantial evidence and pro-

cedural due process review independently in the same case). As Petitioner maintains that the procedure employed below violated the due process clause and her license thus was unconstitutionally revoked, no argument about substantial evidence can save the unconstitutional revocation.

Respondents compound their error by arguing that because there is substantial evidence to support the administrative action there is an adequate state law grounds for the decision, citing Md. State Gov't Code Ann. § 10-215(g).[1] That section permits judicial review of agency action both for lack of substantial evidence and for due process violations. It does not provide a legal basis for affirming the judgment of the court below in the instant case. No state law was involved which might independently cure the due process violation.

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[1] Md. State Gov't Code Ann. § 10-215(g) provides:

(g) *Decision.*—In a proceeding under this section, the court may:

(1) remand the case for further proceedings;

(2) affirm the decision of the agency; or

(3) reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision of the agency:

(i) is unconstitutional;

(ii) exceeds the statutory authority or jurisdiction of the agency;

(iii) results from an unlawful procedure;

(iv) is affected by any other error of law;

(v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or

(iv) is arbitrary and capricious.

Respondents do not argue that the constitutional violation of which petitioner complains was "harmless error". Nor can they. Physical evidence consistent with sexual abuse, which respondents point to, is meaningless without the children's out-of-hearing statements. Dr. Charles Shubin, the physician who examined the children and testified on behalf of respondents, conceded the limited nature of his findings as follows:

> Q: Wouldn't it be important to know if the children had some other type of illness or injury that could possibly have contributed to the symptoms that you find that attribute to sexual injury?
>
> A: Let—let's go back now. The sexual injury is different than saying there's child abuse. In order to say there's child abuse, someone has to put together an identification of who has abused the child and match that with what's found. My physical findings and their interpretation do not make the case of child abuse. Because I'd have no way of knowing who did what to the child. . . . That has to be put together by others and I presume that it is when they're active investigations. That's the rule that I play, putting that one piece in place. When that isn't the case, when there is no active investigation, we certainly do assess further in order to meet the criteria for reporting, and so forth,—there is a basis on which we can judge child abuse per se. You'll notice my findings are in case number one, okay, consistent with sodomy. . . . I didn't say someone had sodomized her because I can't.

Hearing Before William F. Clark, Hearing Examiner, Maryland Department of Health and Mental Hygiene, August 31, 1987, pages 855-56.[2] As the Circuit Court held, "the children's out-of-hearing statements were *foundational* to the case as the State would not have had a case without these statements." Appendix 52a (emphasis in original).

2. Respondents next argue that petitioner's hearing satisfied the three-pronged test formulated by the Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Respondents' argument on the first factor—the nature of the private interest affected by the State's action—is based upon its erroneous assertion that petitioner "concedes that a liberty interest is lacking in this case." Brief in Opposition at 8. Petitioner makes no such concession. As is demonstrated in the Petition (at 18-20), respondents' revocation of her day care license means that petitioner may no longer practice the profession for which she is trained and must live with a terrible personal stigma. Petitioner has a compelling liberty interest.

With respect to the second and third *Mathews v. Eldridge* factors, respondents do little more than repeat the arguments advanced in the opinion below. In discussing the second *Mathews v. Eldridge* factor—

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[2] Dr. Shubin was the sole physician performing a physical examination in six of the eight cases in which physical signs consistent with sexual abuse were found, and was the more experienced physician in a joint examination in a seventh case. Petitioner at no time questioned Dr. Shubin's credentials, who was also the sole physician offered to testify to findings of physical signs consistent with sexual abuse in *Maryland v. Craig*, No. 89-478, Brief for Petitioner at 11, and *Morgan v. Foretich*, 846 F.2d 941, 943 (4th Cir. 1988).

the risk of an erroneous deprivation of an interest through the procedures used and the probable value of additional procedural safeguards—respondents repeat the argument of the court below that cross-examination of the therapists testifying for the State is good enough, while avoiding the court's reasoning based upon the assumption that children do not lie. Appendix 26a-27a. That argument has been discussed in the Petition (at 20-23) and need not be discussed again. In analyzing the third *Mathews v. Eldridge* factor, the government's interest in maintaining the existing procedures, respondents simply contradict themselves. They argue that the State must protect the children from the further anxiety a psychological interview would cause "even if there would be less emotional trauma in a psychological interview than in a cross-examination", but insist that petitioner should have subpoenaed the children. Assuming that existing procedures would allow the issuance of subpoenas to force three-and four-year-old children to testify at a hearing, the State has no interest in maintaining the status quo, because, as respondents admit, a change would mean the adoption of a less traumatic alternative.

3. Respondents' final argument is that petitioner waived her due process rights by not requesting that the hearing officer subpoena the children to testify at the hearing. As noted by the court below, however, petitioner sought psychological examinations of the children, not interrogation by counsel at the hearing.[3]

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[3] The State of Maryland has identified the problems of in-hearing testimony by small children in its Brief for Petitioner in *Maryland v. Craig, cert. granted* 58 U.S.L.W. 3443 (U.S. Jan. 16, 1990) (No. 89-478).

Appendix 21a-22a n.6. Respondents concede that interviews by petitioner's medical experts would be less traumatic than testimony at a hearing. And testimony of psychologists who had conducted interviews (which under the better practice are recorded) are more likely to get at the truth than testimony of the children at a hearing. Consequently, petitioner should not be deemed to have waived her right to psychological interviews merely by not availing herself of the less reliable and more traumatic alternative.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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